

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BLAIR MIELKE,

Plaintiff(s),

vs.

STANDARD METALS PROCESSING, INC.,

Defendant(s).

Case No. 2:14-cv-01763-JCM-NJK

ORDER

(Docket No. 25)

Pending before the Court is Plaintiff's emergency motion to compel and for sanctions and motion to extend the time for deposition. Docket No. 25. Defendant filed a response and Plaintiff filed a reply. Docket Nos. 27, 28. The Court finds this matter properly resolved without oral argument. *See* Local Rule 78-2.

I. Plaintiff's Emergency Motion to Compel and for Sanctions

The Court's initial inquiry regarding a motion to compel is whether the movant made adequate meet and confer efforts. Federal Rule of Civil Procedure 37(a)(1) requires that a motion to compel discovery "must include a certification that the movant has in good faith conferred *or attempted to confer*" with the non-responsive party. Fed. R. Civ. P. 37(a)(1) (emphasis added). Similarly, Local Rule 26-7(b) provides that "[d]iscovery motions will not be considered unless a statement of the movant is attached thereto certifying that, after personal consultation and sincere effort to do so, the parties have not been able to resolve the matter without Court action."

...

1 The case law in this District is clear that “personal consultation” means the movant must
2 “personally engage in two-way communication with the nonresponding party to meaningfully discuss
3 each contested discovery dispute in a genuine effort to avoid judicial intervention.” *Shuffle Master,*
4 *Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 171-72 (D. Nev. 1996). To meet this obligation,
5 parties must “treat the informal negotiation process as a substitute for, and not simply a formal
6 prerequisite to, judicial review of discovery disputes.” *Nevada Power v. Monsanto*, 151 F.R.D. 118,
7 120 (D. Nev.1993). This is done when the parties “present to each other the merits of their
8 respective positions with the same candor, specificity, and support during the informal negotiations
9 as during the briefing of discovery motions.” *Id.* “Only after all the cards have been laid on the
10 table, and a party has meaningfully assessed the relative strengths and weaknesses of its position in
11 light of all available information, can there be a ‘sincere effort’ to resolve the matter.” *Id.* To ensure
12 that parties comply with these requirements, movants must file certifications that “accurately and
13 specifically convey to the court who, where, how, and when the respective parties attempted to
14 personally resolve the discovery dispute.” *Shuffle Master*, 170 F.R.D. at 170.

15 The purpose of the meet and confer requirement is “to lessen the burden on the court and
16 reduce the unnecessary expenditure of resources by litigants, through promotion of informal,
17 extrajudicial resolution of discovery disputes.” *Nevada Power*, 151 F.R.D. at 120. The “rules
18 regarding a meet and confer are not procedural weapons for parties to rely on to require compliance
19 with invalid discovery requests.” *Aevoe Corp. v. AE Tech Co.*, 2013 WL 4714273, at *2 (D. Nev.
20 Aug. 30, 2013) (citing *F.D.I. C. v. 26 Flamingo, LLC*, 2013 WL 2558219, *2-4 (D. Nev. Aug. 1,
21 2013)). As such, the Court ultimately retains discretion to decide discovery motions even where no
22 proper meet and confer has been conducted. *See id.* (citing *Fifty-Six Hope Road Music, Ltd. v.*
23 *Mayah Collections, Inc.*, 2007 WL 1726558, *6 (D. Nev. June 11, 2007)); *Koninklijke Philips*
24 *Electronics N.V. v. KXD Tech., Inc.*, 2007 WL 631950, at *3 (D. Nev. Feb. 26, 2007) order clarified,
25 2007 WL 879683 (D. Nev. Mar. 20, 2007); *IST Tech., LLC v. Rational Enterprises Ltda*, 2008 WL
26 4571246, at *1 (D. Nev. Apr. 8, 2008) (“[T]he Court finds that Plaintiff’s attempt to meet and confer
27 with Defendants’ counsel prior to filing the motion complies with the requirements of Rule 37 and
28 the decision in [*Shuffle Master*, 170 F.R.D. 166]”).

1 Plaintiff is moving to compel Defendant to supplement its deficient responses to Request
2 for Admissions No. 1, 2, 4, 5, and 6, or have the Court deem them admitted. Docket No. 25, at 10-
3 14. Plaintiff argues that Defendant violated Rule 36 by using boilerplate objections, providing
4 responses to improperly restated admissions, and improperly reading vagueness into a well-defined
5 term. *Id.* Plaintiff is also moving to compel Defendant to supplement its deficient responses to
6 Plaintiff's First Set of Interrogatories, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, which Plaintiff
7 propounded on February 20, 2015. *Id.*, at 14-20. Plaintiff argues, *inter alia*, that Defendant used
8 overbroad and unspecific objections, read vagueness into a well-defined term, referred to deficient
9 responses to requests for admission, and inadequately claimed lack of knowledge. *Id.*, at 18-20.
10 Additionally, Plaintiff is moving to compel Defendant to supplement its Request for Production of
11 Documents Nos. 1, 2, 3, 4. *Id.*, at 20-22. Plaintiff argues that Defendant's responses to its Requests
12 for Production "contain references to non-existent documents, provide limited documents, and do
13 not provide documents that were requested." *Id.*, at 21. In total, Plaintiff's motion concerns 21
14 discovery disputes. *See id.*, at 14-21.

15 On March 24, 2015, Plaintiff's counsel outlined her objections to the above discovery
16 disputes in an email to Defendant's counsel. Docket No. 54-18. Plaintiff's counsel stated that she
17 wanted to discuss the issues with Defendant's counsel "in an effort to avoid unnecessary court
18 involvement" and attempted to schedule a meet and confer conference to discuss the discovery
19 issues. *Id.* The following day, Defendant's counsel responded that earliest he would be available
20 to discuss the discovery issues was April 3, 2015, because he was preparing for trial in Texas.
21 Docket No. 54-19. In an effort to accommodate Defendant's counsel's schedule, Plaintiff sent the
22 following:

23 We are more than happy to accommodate your schedule within reason and would
24 even hold the conference at off hours to accommodate your schedule and the time
25 difference (though your client choose [sic] to use a New York firm for a Nevada
26 case). If you are unwilling to participate in a conference in a reasonable time given
the upcoming deposition we will just file a motion with the Court on an emergency
basis.

27 Docket No. 54-20, at 2.

28 . . .

1 On March 25, 2015, Plaintiff's counsel again attempted to set up a meet and confer
2 conference, indicating that she was available by phone to address the discovery issues. Docket No.
3 54-23. Defendant's counsel repeated that he was not available to schedule a meet and confer
4 conference until April 3, 2015. Docket No. 54-24. On March 31, 2015, Plaintiff's counsel conferred
5 telephonically with an attorney at Defendant's counsel's office, Martha Thrush. Docket No. 25, at
6 7. According to Plaintiff's counsel's certification, the parties agreed to: "(1) a 45 day extension so
7 SMP could have time to supplement its discovery responses and SMP's deposition could occur
8 thereafter; and (2) SMP would provide amended discovery responses by on or before April 10,
9 2015."¹ Docket No. 54-1, Donn Decl. at ¶ 21. On April 13, 2015, Defendant's counsel wrote a letter
10 to Plaintiff's counsel, refusing to supplement any of its responses and, in regards to the request for
11 production, stated that it had "produced an additional three thousand nine hundred pages of
12 documents with a privilege log." Docket No. 54-31.

13 The Court has reviewed the pending certification of counsel. Docket No. 54-1, Donn Decl.
14 at ¶¶ 21, 24. Given the manner in which the meet and confer is described, it does not appear that the
15 parties attempted to engage in a personal consultation after Defendant refused to supplement its
16 discovery responses on April 13, 2015. However, the Court must balance this conclusion against
17 the fact that Plaintiff's counsel's attempted to set up a meet and confer conference numerous times
18 and the fact that an attorney at Defendant's counsel's office, Martha Thrush, agreed to supplement
19 them after speaking to Plaintiff's counsel. Docket No. 54-1, Donn Decl. at ¶ 21. Moreover,
20 Defendant's response to the motion to compel consists in its entirety of roughly three pages dealing
21 exclusively with the meet and confer requirement, and is devoid of citation to any legal authority of
22 any kind in regards to Plaintiff's arguments that Defendant's discovery responses are deficient and
23 improper. *See* Docket No. 27, at 2-4; *see* Local Rule 7-2(d) (the failure to file "points and
24 authorities" in response to a motion constitutes consent to the granting of the motion). The Court
25 is also mindful of the need to complete discovery in this case. Given these considerations, the Court
26 exercises its discretion to consider the motion to compel, but will take into account the failure to

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28 ¹ Defendant does not dispute that attorney Martha Thrush agreed to supplement Defendant's
discovery responses. *See* Docket No. 27.

1 meet and confer as it relates to the imposition of sanctions under Rule 27. *See Shuffle Master*, 170
 2 F.R.D. at 173 (court declined to award attorney’s fees where moving party failed to satisfy meet and
 3 confer requirements).

4 Accordingly, Plaintiff’s motion to compel and for sanctions is **GRANTED in part** and
 5 **DENIED in part**. Defendants are to provide proper responses to requests for admission,
 6 interrogatories, and request for production identified in the motion within 14 days of this Order.
 7 Due to the failure to engage in a proper meet and confer conference, the Court exercises its discretion
 8 to not award sanctions against Defendant. Failure to comply with this Order may result in case-
 9 dispositive sanctions. Fed. R. Civ. P. 37(c).

10 **II. Plaintiff’s Motion to Extend Time for Depositions**

11 Plaintiff also moves to extend the time for depositions pursuant to Rule 30(d)(1). Docket No.
 12 25. Pursuant to Rule 30(d)(1), “[u]nless otherwise stipulated or ordered by the court, a deposition
 13 is limited to 1 day of 7 hours.” The rule further provides that the Court “must allow for additional
 14 time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent,
 15 another person, or any other circumstance impedes or delays the examination.”

16 Rule 26(b)(2) provides that “the court may alter the limits . . . on the length of depositions.”
 17 Further, “[f]or good cause, the court may order discovery of any matter relevant to the subject matter
 18 involved in the action.” Fed. R. Civ. P. 26(b)(1). However, Rule 26(b)(2)(C) provides that:

19 the court must limit the frequency or extent of discovery otherwise allowed by these
 20 rules or by local rule if it determines that:

21 (ii) the party seeking discovery has had ample opportunity to obtain the information
 by discovery in the action; . . .

22 Thus, a showing of “good cause” is necessary to justify a court order seeking to extend a deposition
 23 beyond seven hours. *See Allstate Ins. Co. v. Nassiri*, 2011 U.S. Dist. LEXIS 79768, 32-33 (D. Nev.
 24 July 20, 2011); *Thomas Young v. Sutter Cent. Valley Hospitals*, 2013 WL 3054167, at *2 (E.D. Cal.
 25 June 17, 2013).

26 On April 3, 2015, Plaintiff noticed the deposition of Defendant’s Person Most
 27 Knowledgeable (“PMK”) for May 11, 2015, in Gadsden, Alabama. Docket No. 54-29. The notice
 28 of deposition encompasses twelve topics. *Id.* Plaintiff states that it is “not clear” whether the

1 deposition will be able to conclude within a single day of seven hours, and thus requests the Court
2 to allow two days of ten hours for the deposition. Docket No. 25, at 24. Plaintiff gives three reasons
3 for needing additional time. First, Plaintiff asserts that Defendant's counsel may impede or delay
4 the examination, as evidenced by their email correspondence where Defendant's counsel states he
5 will "bust" the deposition if it goes beyond seven hours. *Id.*, at 23. Second, Plaintiff contends that
6 it would "significantly compound costs" if Plaintiff were forced to first depose Defendant's PMK
7 and then move for additional time if the deposition cannot be completed within seven hours. *Id.*, at
8 23. Third, Plaintiff asserts that Defendant recently produced approximately 3,000 additional pages
9 of documentation and Plaintiff anticipates more documentation will be forthcoming that will need
10 to be addressed during the deposition. *Id.*, at 24.

11 Defendant correctly asserts that "Plaintiff cites no authority standing for the proposition that
12 additional time must be ordered on the basis of speculation that a deponent will act improperly."
13 Docket No. 27, at 5. Moreover, Plaintiff has failed to substantiate the assertion that additional time
14 is necessary. *See Sommers v. Cuddy*, 2013 U.S. Dist. LEXIS 2800 (D. Nev. Jan. 8, 2013) (finding
15 that plaintiffs had not substantiated the need for additional time). As a result, the Court finds that
16 Plaintiff has not, as of this juncture, shown good cause at this time to extend the deposition beyond
17 seven hours.² Accordingly, Plaintiff's motion to extend the time for depositions pursuant to Rule
18 30(d)(1) is **DENIED** without prejudice.

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28 ² The Court expresses no opinion at this time as to whether Plaintiff will be able to show
good cause to extend the deposition once the deposition is in progress.

1 **III. Conclusion**

2 For the reasons discussed above,

3 **IT IS HEREBY ORDERED** that Plaintiff's motion to compel and for sanctions is
4 **GRANTED in part** and **DENIED in part**.

5 **IT IS FURTHER ORDERED** that Defendants are to provide proper responses to requests
6 for admission, interrogatories, and requests for production within 14 days of this Order.

7 **IT IS FURTHER ORDERED** that Plaintiff's motion to extend the time for depositions
8 pursuant to Rule 30(d)(1) is **DENIED** without prejudice.

9 DATED: May 7, 2015

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14 NANCY J. KORPE
15 United States Magistrate Judge
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